impact point is limited only by your imagination. The lesson is to stop and consciously determine the "point" that you are trying to make with each question and then deliberately structure the question to increase or decrease the "impact" of the point.

2. Use of the eyes.

One's eyes are often the most powerful means of communicating. Actors and actresses know that credibility and persuasion arise only when you put aside your script and look at the other actors and actresses with whom you are communicating. Similarly, seasoned practitioners use their notes to only a limited degree as they realize that looking at the witness or looking at the fact-finder is too powerful a technique to be lost by dependence on a script.

Impact points again can be emphasized with the use of the eyes. If a particularly important question is being asked of a witness being cross-examined, why not turn to the fact-finder and engage the judge's or jury's eyes as you ask the question and make your impact point. If necessary, ignore or turn your back on the cross-examined witness. Your eyes draw the fact-finder's attention to your point and subtly communicate that this is a point of importance and emphasis.

3. Images.

The most accomplished trial lawyers do not speak words; they paint images. They use the language to draw a word picture, which the fact-finder can easily imagine based on his or her experience. Often the specific technique is to use an analogy or a simile.

For instance, your expert witness should be well enough prepared to describe the "unanticipated outward vector of lateral stresses on the fission chamber's brittle ceramic containment wall" by an analogy that likens the action to a "rock smashing through a living-room picture window." The fact-finder is able to cut through the scientific jargon and understand the analogy and the point. Each of us can easily imagine a rock smashing through the picture window of a home. Although each of us may be envisioning a different living room, a different picture window, or a different size of rock, the image is nonetheless vivid and allows the witness and the witness's lawyer to have a private dialogue with each of the listeners.

During the course of a hearing or a trial, a memorable image can often be drawn or may even arise as a matter of happenstance. For instance, the witness whose cellular phone rang in his briefcase while he was testifying might provide a rare moment of comic relief. In closing argument, the image of that witness can best be resurrected not by describing the witness's background, but by simply reminding the fact-finder of the memorable incident:

> *"Remember Mr. Brown, the witness whose cell phone rang while he was on the stand?"*

Immediately the fact-finder will have in mind the image of the witness to whom you are referring. Similarly, if you want to refer to the expert's testimony about the vector and stresses, don't repeat the technical analysis; simply remind the fact-finder of the expert who testified about the interaction of the stresses being like "a rock smashing through a living-room picture window."

The beauty of images is that not only do they communicate powerfully in the first place, but also, once an image has been established, the repetition of that image can immediately bring to mind the witness, the result of the experiment, or the point to be made.

4. Conclusion.

All of us are faced with two challenges as we attempt to master the art of persuasion. First, finding the time to prepare with the sufficient detail to be sensitive to issues such as impact points, use of the eyes, creating images, and using our passions. Second, stopping when we see an accomplished practitioner employing these methods and analyzing what was done, how it was done, and how it should be modified to work best for us. All of this inevitably leads to introversion, introspection, and egocentricity.

What Can You Afford to Risk? Self-Incrimination in Civil Litigation

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When a civil action results in criminal charges, often the most compelling evidence in favor of conviction is self-incriminating evidence disclosed in the civil case. Recently, I spoke on a panel addressing the various ways civil litigation can implicate a client in criminal conduct. Following the presentation, a member of the audience submitted a question: "Practically speaking, what options exist if you identify an area where your client might incriminate himself? And, if your client makes an incriminating statement or turns over an incriminating document, what can be done to protect them in the criminal context?" This article is my attempt to answer these practical questions from the perspectives of plaintiff, defendant, and witness.

I. The Basic Legal Framework

The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution gives every person the right not to "be compelled in any criminal case to be a witness against himself."[1] Article I, section 12 of the Oregon Constitution states: "No person shall be … compelled in any criminal prosecution to testify against himself."[2] These privileges can be raised in any proceeding at any juncture where the testimony may be incriminating in a future

1 U.S. Const. Amend. V.

2 The jurisprudence regarding the Self-Incrimination Clause of the Fifth Amendment generally applies to the Oregon Constitution's analogous privilege.

criminal proceeding.[3] This includes civil, administrative, and criminal cases, as well as non-judicial settings.[4]

In order for a person to assert their Fifth Amendment right against self-incrimination, they must have an articulable interest that can be expressed in order to show their testimony would either support a conviction or "furnish a link in the chain of evidence needed to prosecute [them] for a federal crime."[5] A court determines whether a person's Fifth Amendment assertion is justified by deciding "whether [they are] confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination."[6] Of course, the witness does not need to explain why answering a question would incriminate them. "To sustain the privilege, it need only be evidenced from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[7] In other words, the Fifth Amendment protects more than the proverbial smoking gun and other plainly phrased admissions of wrongdoing. It also protects statements that may seem innocent on their faces but, in light of previously developed facts, could be injurious.

In addition to the testimonial setting, the Fifth Amendment also applies when a person produces documents, which typically occurs in response to a subpoena *duces tecum* or a request for production. Pursuant to the "Act of Production" privilege, the very act of producing documents (as opposed to the contents of the documents themselves[8]) is protected under the Fifth Amendment to the extent that the production may constitute implied testimony that could be incriminating.[9] The "Act of Production" privilege may arise where the production of records amounts to the tacit admission of a document's existence or a client's possession of them, either of which could be incriminating. In addition, the "Act of Production" privilege is implicated when the production may serve to authenticate documents that would otherwise have questionable foundations.[10] If, under any of these theories, a production of documents is incriminating, a person can assert their Fifth Amendment right and refuse to produce the documents unless the requesting party can show with "reasonable particularity" that the existence, location, and authentication of the documents are "foregone conclusions."[11]

3 *United States v. Balsys*, 524 U.S. 666, 672 (1998).

4 *See id.; State v. Langan*, 301 Or. 1, 5 (1986) (Article I, section 12 privilege against self-incrimination applies in any judicial or non-judicial setting where compelled testimony is sought that might be used against the witness in a criminal prosecution).

5 *United States v. Rendahl*, 746 F.2d 553, 555 (9th Cir. 1984) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

6 *United States v. Apfelbaum*, 445 U.S. 115, 128.

7 *Hoffman*, 341 U.S. at 486-7.

8 Because the Fifth Amendment only protects a person from *compelled* self-incrimination, a document that was voluntarily created is not protected. *See Fisher v. United States*, 425 U.S. 391, 396 (1976); *cf. Schmerber v. California*, 384 U.S. 757, 761 (the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature").

9 "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988).

10 *See id*. at 216 (noting that authentication by production would be "testimonial" in nature).

11 *In re Grand Jury Subpoena*, 383 F.3d 905 (9th Cir. 2004).

II. Strategic Considerations

In some cases, your client may choose to waive their Fifth Amendment right against self-incrimination and make statements or produce documents in a civil case. Such a waiver must be "knowing, intelligent, and voluntary."[12] Before making this choice, however, counsel must carefully advise a client on the risks of doing so. Balancing your client's interests against likely outcomes is extremely difficult, and the decision is not always clear cut. For example, if your client is the subject of a SEC enforcement action and an ongoing criminal investigation, the answer is far simpler than in a situation where you believe your client could be implicated in a civil matter that involves no known criminal investigation, but which may still carry criminal ramifications. Your advice will also depend on whether your client is a plaintiff, a defendant, or a witness subpoenaed to testify or produce documents.

A. Plaintiffs

Advising plaintiffs on whether they should waive their Fifth Amendment right requires contending with a number of emotional considerations. In some instances your client feels wronged, and you, having conducted discovery, also believe that your client has been wronged. In other instances you believe in the client's cause, and the client either needs financial compensation for his losses, wants to set a precedent, or simply wants to vindicate themselves or repair their reputation. Regardless, if the matter is pursued, the defense may try to implicate your client in wrongdoing, whether fairly or not. There is a significant risk that, even if your client prevails in the civil case, the evidence obtained in that litigation could later be used against your client to build a criminal case. The success in one arena could jeopardize your client's interests in another.

For a plaintiff, there is really only one option for avoiding criminal liability: not pursuing a claim. Although this outcome is difficult for a client to accept, the added costs of later defending against a criminal prosecution will usually outweigh any potential recovery in a civil case. Of course, counsel should also consider any avenue to settle a matter in a way that might partially, if not totally, bring about the relief sought in the lawsuit. For example, with the client who sees themselves as a whistle blower, perhaps you could persuade your client's employer to adopt new policies that will help ensure that the sort of conduct at issue in the case does not reoccur.

B. Defendants

Like plaintiffs, defendants certainly experience strong emotions and the same considerations may exist: vindication, reputation, money, and fear of setting a precedent. Yet the risk of incrimination in formulating a defense may exist because of the nature of the claims and the interest of the accuser. The risk in this situation may be more obvious, but the choices more limited. Defendants, unlike plaintiffs, do not have the initial choice of whether or not to bring the litigation in light of all of the risks. Therefore, before you begin the discussion with your client about what they can "afford to risk," it is important to understand the various areas where criminal liability arises, and what can or can't be done to resolve the risk.

12 *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *State v. McAnulty*, 356 Or 432, 455 (2014).

In determining whether your client may be facing criminal liability, you should consider whether the facts used to establish your client's claims or defenses, or the facts that will come out in their testimony, could also be used to satisfy the elements of a criminal charge. You should also determine whether the government is already investigating your client. If you are unsure whether there is an active investigation, but believe your client has potential criminal liability, it can be wise as a first step to reach out to the law enforcement agency or prosecutor's office that would be the entity investigating your client. Although prosecutors are not required to inform prospective defendants that they are being investigated, they cannot engage in "trickery or deceit" in order to affirmatively mislead the subject of parallel civil and criminal investigations into believing that the investigation is exclusively civil in nature pursuant to the "parallel proceedings" doctrine.[13] Regardless of what a prosecutor tells you about the status of their investigation, an initial inquiry will at a minimum open up a dialogue and, in some circumstances, the dialogue itself can help counsel understand whether or not their client's case is the type that the prosecutor would have an interest in. It can also create an opportunity for you to explain your client's role in the matter. If you have a compelling argument to make at this early stage, it could make the difference between your client being a cooperating witness or a defendant in a future criminal proceeding.

If you ultimately determine your client has potential criminal liability, the next step is to consider the potential downsides of asserting the Fifth Amendment. If your client is a litigant in federal court, they run the risk of having an adverse inference drawn against them with respect to the fact they refuse to disclose.[14] However, such an inference can be drawn only if independent evidence exists that could prove the fact your client refuses to disclose.[15] In Oregon state court, on the other hand, no adverse inference is allowed in the event your client asserts their Fifth Amendment right.[16] But, a defendant cannot use the assertion of the Fifth Amendment as both a sword and shield. If your client testifies affirmatively, they may then waive their right to assert the Fifth Amendment during cross examination. In that situation, the client runs the risk of having their testimony struck if they do not answer questions.[17]

In addition to asserting the Fifth Amendment there are several alternatives available to defendants that, if successfully obtained, can at least temporarily mitigate the risk of criminal liability.

13 *United States v. Stringer*, 521 F.3d 1189, 1198 (9th Cir. 2008) (citing *United States v. Robson*, 477 F.2d 13, 18 (9th Cir. 1973).

14 *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976).

15 *Doe ex rel. Rudey-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) ("[W]hen there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation, otherwise no negative inference will be permitted.").

16 OEC 513(1) ("The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege."); *John Deere Co. v. Epstein*, 307 Or 348 (1989).

17 *See United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980).

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1. Settlement

Settlement is, of course, the obvious choice if the parties can reach an acceptable agreement. Even with a settlement, however, counsel must carefully draft written agreements to ensure recitals and other factual provisions do not implicate their client.

2. Stay of Proceedings

In a case where a settlement is not an option, a defendant can move to stay a civil case in whole or in part if the facts of the lawsuit parallel possible criminal liability. However, a court has discretion to refuse to stay the proceeding after balancing the following factors: (1) the interest of the plaintiffs in proceeding expeditiously, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court, and the efficient use of judicial resources; (4) any relevant interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and, if applicable, criminal litigation.[18] Put more simply, a defendant will not be granted a stay based on the mere possibility of criminal liability, and will have to assert their Fifth Amendment right if denied a stay.

3. Motions to Quash or Motions for a Protective Order

A complete consideration of the grounds for seeking a protective order against a discovery request or quashing a subpoena is beyond the scope of this article. However, a discovery request or subpoena may be objectionable because it is overbroad, asks for privileged information, or, of course, where responding to it would expose your client to self-incrimination because it assumes guilt.[19]

C. Witnesses

A client who is subpoenaed to testify as a witness or produce documents in a matter where they may be exposed to criminal liability is in a different situation than a plaintiff or a defendant. Such a client lacks the power to stay a proceeding, and has no claim to drop. Furthermore, they cannot simply refuse to comply with a subpoena or decide not to attend the proceeding. A witness can, however, refuse to answer questions by asserting their Fifth Amendment right without having to worry about an adverse inference being drawn against them. But, the act of refusing to answer will certainly place the spotlight on them and their conduct. It may also cause reputational damage. This sort of client, because of their role in society or within a company, may be reluctant to assert their Fifth Amendment right. Such a client is also the very person with whom having the discussion regarding risks may be the most important.

III. Damage Control

The biggest risk of your client making incriminating statements is that those statements may later be used in a criminal prosecution against them. But how does this play out in the real world? One example is where your client appears for a deposition and makes statements that implicate them in criminal activity. These statements have several negative consequences. First, the statements may provide the government a road map of your client's likely defenses. Second, the government may claim that the statements themselves (if any aspect of them are at odds with the facts alleged by the prosecution) were an obstruction of an investigation. This, in turn, could allow a prosecutor to bring an obstruction charge separately, or use the allegation of obstruction to enhance a criminal sentence.[20] Third, and most importantly, the statements will be admissible in evidence in a criminal prosecution against your client as admissions of a party opponent. Unfortunately, regardless of your client's intent when making the statements, there is no similar right for a criminal defendant to use the exculpatory portions of the same deposition. Such a deposition can be particularly damaging if your client chooses not to testify during a criminal trial and has no chance to explain the context of the statement or what they were thinking when they made it.

Under the rules of evidence, in order to mitigate the harm of the prior statement, defense counsel can (1) find other areas of testimony from the prior statement, omitted by the prosecutor, that are admissible under the "rule of completeness;"[21] (2) challenge the prosecutor's characterization of the statement as an admission; or (3) argue a constitutional basis for exclusion that would otherwise make the statement involuntary.

One such constitutional basis could be that the statement was given pursuant to an involuntary waiver of your client's Fifth Amendment right. If a government investigator was questioning your client when the incriminating statement was made, then there may be an avenue to suppress the statement through the doctrine of parallel proceedings. This doctrine, in a nutshell, says that a civil case cannot be used as a stalking horse for a criminal prosecution. For one thing, the government cannot bring a civil action solely to obtain evidence for a criminal prosecution.[22] But even if the civil action is not brought *solely* for the sake of criminal prosecution, the circumstances may indicate that a criminal prosecution is inappropriately utilizing a civil investigation for fact-gathering.[23] If, for instance, staff from separate civil and criminal agencies meet regularly, identify targets together, or share documents, there may be grounds in the criminal prosecution to suppress a statement made in response to questioning by the civil investigators. The same argument could be made if the government creates an "agency" with a private civil attorney and uses that attorney to gather information for a prosecution. In such a

18 *Id*.

19 For example, if a subpoena to a banker ordered the production of "all documents related to the unauthorized cashing of checks," a court would almost certainly quash it.

20 However, before the statement can be used for such a purpose, the government must demonstrate that "the defendant gave false testimony on a material matter with willful intent." *See, e.g.*, *United States v. Herrera-Rivera,* 832 F.3d 1166, 1175 (9th Cir. 2016) (quoting *United States v. Castro-Ponce*, 770 F.3d 819, 822 (9th Cir. 2014)).

21 Federal Rule of Evidence 106 provides that, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." Rule 106 of the Oregon Evidence Code provides the same rule, but extends it beyond just writings and recorded statements to "act[s], declaration[s], and conversation[s]."

22 *United States v. Kordel*, 397 U.S. 1, 11 (1970).

23 *Stringer*, 521 F.3d 1198.

situation, the civil attorney may be found to have acted "as an 'instrument' or agent of the state."[24] A court may make such a finding after determining: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends."[25]

IV. Conclusion

The decision of whether to assert the Fifth Amendment right against self-incrimination can have a dispositive impact on civil litigation. Clients facing this choice may be dealing with the potential loss of a business, a job, emotional or physical pain, or a dire need for financial compensation or even simple vindication. These clients certainly never imagined they would need to choose between asserting legal claims or defenses and taking the Fifth. I have learned over the years that in order to resolve the issue the most important question to explore with the client is: "What can you afford to risk?" For each client in each situation, the answer may be very different. An outsider may assume that the obvious answer is, "I cannot afford a criminal conviction," or, "I cannot afford a prison sentence." But sometimes, despite counsel's concern for their client's criminal prosecution, that is not the most important factor to a client. Some clients may care more about their reputation in the proverbial "court of public opinion," or the business they have built up over time, or conveying to their children that you can't just give in to bullies. Each client is unique, and each has a different take on what constitutes too large a risk. Helping a client figure out the risks and how to navigate the areas that are potentially incriminating is one of the most difficult areas for counsel to advise, and for the client to decide what is ultimately not worth risking.

24 *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971).

25 *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994) (quoting *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994)).

Omnicare: The Case for Application to Oregon's Securities Law Statutes

By Meryl Hulteng
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In 2015, the Supreme Court issued their now well-known *Omnicare* opinion, weighing in on the debate about what extent statements of opinion in securities offerings can be the basis for a securities fraud claim.

Prior to *Omnicare*, actionability of opinion statements in securities claims was treated inconsistently among the circuits. In the Second and Ninth Circuits, statements of opinion were only misleading, and thus actionable, if the issuer did not sincerely believe the opinion. *See, e.g.*, *Fait v. Regions Financial Corp.*, 655 F.3d 105, 110 (2d Cir. 2011); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009). In contrast, in the Sixth Circuit, an opinion was misleading if objectively incorrect, regardless of whether the issuer actually believed it. *Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare*, 719 F.3d 498 (6th Cir. 2013), *rev'd sub nom Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318 (2015).

In *Omnicare*, the Supreme Court fashioned a test for statements of opinion that was a departure from both the defendant-friendly standards in the Second and Ninth Circuits, as well as the more plaintiff-friendly Sixth Circuit standard. The Court held that an issuer's statement of opinion can be actionable, but only if: (1) the issuer did not actually believe the stated opinion; or (2) the stated opinion contains other embedded factual statements that were untrue. In addition, even if an opinion is sincerely held and otherwise true, it may also be actionable if the issuer omits material facts and the omission makes the statements misleading to a reasonable investor.

Omnicare was originally touted as a major victory for investors, seemingly expanding the circumstances under which an opinion may be actionable. And the standard was quickly applied to other types of claims, including Rule 10b-5 fraud claims. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 610 (9th Cir. 2017).

Thus, immediately after *Omnicare*, with investors buoyed by the impression of a more investor-friendly standard and an expansion to several types of securities claims, opinion-based claims based on *Omnicare* proliferated, or at the very least gained more attention. Yet the bounty of subsequent litigation merely gave the courts ample opportunity to tamp down investor excitement by narrowly interpreting the new rule and imposing a high burden on investors trying to prove opinion-based claims.

Now, three years out from the Supreme Court's ruling in *Omnicare*, for Oregon practitioners the question remains —